In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 608

MICHAEL KOKIN, GUSTAVE DAVE LANGE, AND EASTERN FIREARMS COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners were convicted in the United States District Court for the District of New Jersey (Pet. App. 1a–11a) of violations of the National Firearms Act.[1] On February 8, 1966, petitioners each were

[1] Petitioners were convicted of the transfer of a firearm without having paid the transfer tax required by 26 U.S.C. 5811, in violation of 26 U.S.C. 5861; the transfer of a firearm without having procured and forwarded to the Secretary of the Treasury or his delegate the order forms required by 26 U.S.C. 5814, in violation of 26 U.S.C. 5861; and of dealing in firearms without having registered as required by 26 U.S.C. 5802, and without having paid the tax imposed by 26 U.S.C. 5801(a)(2), in violation of 26 U.S.C. 5854 and 5861. Petitioners were acquitted on a related conspiracy count, and on four counts involving a separate transaction.

239-134—66

fined $500. The court of appeals affirmed the conviction on July 29, 1966. 365 F. 2d 595 (C.A. 3) (Pet. App. 12a–13a). Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including September 27, 1966. The petition for a writ of certiorari, filed on September 29, 1966, is out of time under Rule 22(2) of the Rules of this Court.

There is, in any event, no occasion for further review of petitioners' convictions by this Court, especially since the issues presented in the petition were not properly raised in the courts below.[2]

The relevant facts are stipulated.[3] On August 5, 1963, Agent Conover of the Alcohol and Tobacco Tax Division of the Internal Revenue Service visited the Eastern Firearms Company, of which petitioners Kokin and Lange were officers, in Newark, New Jersey. Conover attempted to purchase from petitioner Lange an M–1 carbine and all the parts necessary to convert the M–1 to an M–2 automatic carbine. Lange advised Conover that he did not have all the necessary M–2 parts available, but that he would have them in about two weeks. Conover returned on October 17, 1963, repeating his request for an M–1 and a complete set of M–2 parts. Petitioner Kokin told the agent that he then had all the M–2 parts, but did not have an M–1 carbine. On November 4, 1963, petitioners

[2] The issues were first raised in a motion to extend the time within which to petition for rehearing in the court of appeals, time having expired. See Pet. App. 13a–14a, 15a–22a. The motion was denied by the court of appeals on September 20, 1966 (Pet. 9).

[3] The stipulated facts are reported in the opinion of the district court (Pet. App. 1a, 2a–7a).

Kokin and Lange sold Conover a complete set of M–2 parts and an M–1 carbine. At the time of this sale, Kokin told the agent that he did not have an M–2 stock, but that the M–1 stock could be altered to fit the M–2. Kokin then attempted to make an alteration on the M–1 stock with a knife, and Lange completed the job with a power grinder. Lange completed re-assembly of the M–1, and Kokin gave Conover an Army Field Manual on the M–2 automatic carbine. On that same day, Conover, in the presence of another Revenue agent, assembled an M–2 automatic carbine using the M–1 carbine and the M–2 parts which he had purchased from Eastern Firearms. The Army Field Manual was used as a guide. When so assembled, the weapon would not function properly because of a bent and worn disconnector lever assembly.

The following day, Conover returned to Eastern Firearms with the completely assembled M–2 carbine separated from the stock. Petitioner Lange replaced the faulty disconnector lever assembly, altered the stock to make it fit, and checked its functioning. Thereafter, on November 8, Conover re-assembled the M–2 automatic carbine as it had been assembled by petitioner Lange. When test fired, the assembled M–2 carbine worked automatically with one pull on the trigger (Pet. App. 3a–7a), *i.e.*, it fired more than one shot by a single functioning of the trigger.

Also stipulated were the facts that an M–2 carbine is a "machine gun" within the meaning of 26 U.S.C. 5848(2); that petitioners were not duly licensed deal-

ers of machine guns within the provisions of 26 U.S.C. 5848(8); that when the transfer to Conover was made, petitioners failed to pay the $200 transfer tax required by 26 U.S.C. 5811 (a) and (b), procure and forward the order form required by 26 U.S.C. 5814, and register pursuant to 26 U.S.C. 5801(a)(2) (Pet. App. 3a–7a).

1. The trial court properly found that the piecemeal transactions of petitioners constituted a transfer of a machine gun in violation of the applicable sections of the Act. As the court stated (Pet. App. 8a–9a):

> In essence, then, Kokin and Lange were presented with a sales proposition consisting of the purchase of an unassembled M–2 carbine rifle. The facts demonstrate an unbroken commercial interest on the part of defendant vendors for some three months in overseeing the actual realization of that weapon. This interest was in no way severed or satisfied on mere transfer of the basic unfitted components to Conover. Rather, it is clear, the interest terminated only upon operational assembly by and in the presence of defendants. Only at this point did Conover obtain what he had bargained for—an M–2 carbine automatic rifle.

Indeed, the district court interpreted the Act rather narrowly, holding as to another transaction by petitioners that the mailing of an M–1 carbine and stock together with M–2 components was not the transfer of a machine gun as defined in 26 U.S.C. 5848(2). See Pet. App. 7a–8a. With respect to the sale to agent Conover, however, the courts below properly

found, in view of petitioners' awareness of the purpose of the transaction and their assembly of the weapon, that petitioners transfered a "machine gun" within the meaning of the Act.

2. Petitioners contend that they were entrapped. Because that issue was raised neither in the trial court nor in the court of appeals, petitioners may not now raise it. *Craig* v. *United States,* 337 F. 2d 28 (C.A. 8), certiorari denied, 380 U.S. 909; *Grant* v. *United States,* 291 F. 2d 746 (C.A. 9), certiorari denied, 368 U.S. 999.

In any event, the stipulated facts do not establish that petitioners were entrapped as a matter of law. It cannot be said that agent Conover implanted in the minds of innocent persons the disposition to commit the offense. See *Sorrells* v. *United States,* 287 U.S. 435, 442. Rather, he merely afforded petitioners the opportunity to commit the crime. That the stipulation reveals that agent Conover was persistent does not establish by any means that petitioners were not otherwise predisposed to commit the offense through selling an automatic weapon to any customer who sought one. Compare *Sherman* v. *United States,* 356 U.S. 369.

3. The indictment charged that the offenses occurred on November 4, 1963. Upon considering the stipulated facts, the trial court determined that the transfer was completed on November 5, 1963, when petitioners assembled the weapon into working condition. The variance of one day between the date alleged in the indictment and that disclosed by the

proof was neither prejudicial to petitioners, nor fatal to the government's case. *Cogdell* v. *United States*, 307 F. 2d 176 (C.A.D.C.), certiorari denied, 371 U.S. 957. In this connection, petitioners assert that the court of appeals radically changed the theory of the case in affirming the convictions, and that therefore the convictions must be reversed under the principles of *Cole* v. *Arkansas*, 333 U.S. 196. The court of appeals phrased the question as whether "in the circumstances of this case" the transfer of the M–1 carbine and the parts necessary to convert it into an automatic rifle constituted a violation of the Act. It held, *per curiam* that "[i]n the circumstances elaborated in the opinion of the district court and for the reasons there stated we are satisfied that, to the extent found by the district court, the appellants have violated the law * * *" (365 F. 2d at 596; Pet. App. 12a–13a). Thus, it is clear that the decision of the court of appeals did not vary from that of the district court.

4. Petitioners also contend that they should not have been found guilty, for they lacked intent to commit a crime. The trial court found that petitioners knowingly transferred a machine gun; no further showing of specific intent to violate the Act is necessary. See, *e.g.*, *Sipes* v. *United States*, 321 F. 2d 174 (C.A. 8); *United States* v. *Decker*, 292 F. 2d 89, 90 (C.A. 6), certiorari denied, 368 U.S. 834; *United States* v. *Wost*, 148 F. Supp. 202, 204 (N.D. Ohio). It is significant in this regard that the penalty provision of the Act, 26 U.S.C. 5861, unlike penalty pro-

visions of other special taxes,[4] does not require a willful violation.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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[4] See, *e.g.*, 26 U.S.C. 7201, 7202, and 7203.

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